THE CUSTOMS AND TAX ADMINISTRATION OF THE KINGDOM OF DENMARK v. DANIDAN CAPITAL LTD & ORS

HIGH COURT SABAH & SARAWAK, LABUAN
LEONARD DAVID SHIM JC
[SUIT NO: LBN-22NCvC-5-6-2018]
19 MAY 2021

CIVIL PROCEDURE: *Disclosure – Proceedings – Leave – Application for – Allegations of multinational fraud – Fraudulent applications for refund of alleged withheld dividend tax – Applicant commenced recovery action for losses in various foreign jurisdictions – Application for leave to furnish, disclose and publish details of proceedings in High Court Labuan to foreign jurisdictions – Whether details of proceedings in High Court Labuan relevant to proceedings in foreign jurisdictions – Whether application ought to be allowed – Rules of Court 2012, O. 92 r. 4 – Labuan Companies Act 1990, s. 149(3) – Labuan Financial Services and Securities Act 2010, s. 178(4)*

The plaintiff, the Customs and Tax Administration of the Kingdom of Denmark, a Danish Ministerial Authority, claimed that it fell victim to a multinational fraud, resulting in it being defrauded of approximately DKK12 billion between 2012 and 2015. According to the plaintiff: (i) the worldwide fraudulent scheme entailed the participation of numerous actors situated in a number of jurisdictions; (ii) the United States of America ('USA') and Malaysia were used for their Double Taxation Avoidance Agreement with Denmark; (iii) a tax resident in these jurisdictions, a legitimate shareholder of Danish shares, would be entitled to apply for the refund of withheld taxes on dividends issued on these Danish shares; (iv) the USA and Malaysia entities were used as devices through which to make fraudulent applications to the plaintiff for refunds of purported tax withheld on dividends issued by Danish corporations when these entities never owned any Danish corporation shares and never received any dividends from it; and (v) the persons and entities who played a part in putting together this fraudulent scheme were persons/entities in, *inter alia*, the United Kingdom ('UK') and Dubai. The plaintiff had filed suits on other jurisdictions, namely the USA, the UK and Dubai ('foreign proceedings'). These civil proceedings involved Labuan companies or entities. By an *ex-parte* order, the High Court of Sabah and Sarawak at Labuan uplifted the Labuan secrecy order. Upon the applications by the defendants, the Labuan secrecy order was set aside by the High Court, Labuan ('High Court decision'). The *Mareva*, *Anton Piller* and consequential orders regarding the seized items in relation to the *ex parte* AP order were also set aside. The plaintiff appealed to the Court of Appeal against the High Court's decision setting aside the *Mareva*, *Anton Piller*, consequential and the Labuan secrecy orders ('encl. 598'). The Court of

Appeal allowed the plaintiff's appeal against the High Court decision ('civil appeals') and restored the order uplifting the Labuan secrecy. The *Mareva*, *Anton Piller* and consequential orders were also restored by the Court of Appeal. In the present application, the plaintiff sought the disclosure of, *inter alia*, details of these proceedings pursuant to s. 149(3) of the Labuan Companies Act 1990 ('LCA'), s. 178(4) of the Labuan Financial Services and Securities Act 2010 ('LFSSA') and O. 92 r. 4 of the Rules of Court 2012 ('ROC'), namely the orders for leave to furnish, disclose and publish (i) details of these proceedings, including the contents of cause papers and affidavits filed, to its foreign legal representatives and the courts of law of foreign jurisdictions where the plaintiff had commenced or would commence an action to remedy or recover its losses caused by fraudulent applications for refund of alleged withheld dividend tax; and (ii) to the State Prosecutor for Serious Economic and International Crime ('SØIK'), a unit within the Danish Prosecution Authority, notice of application and affidavits filed on behalf of the plaintiff in these proceedings and the orders made in these proceedings. The grounds of this application were, *inter alia*, (i) the details of the proceedings, including the contents of cause papers and affidavits filed, were relevant to the proceedings in foreign jurisdictions; (ii) the limited disclosure sought for SØIK, through this application, would facilitate investigations into the fraud committed against, in effect, Denmark and, therefore, the limited disclosure would be reasonable and warranted by conscionable expectations; and (iii) the orders sought were consonant with an established pedigree of modern cases which showed that, when resolving an alleged conflict between the disclosure of evidence/documents in aid of foreign proceedings litigating a multinational fraud and a duty of confidentiality preventing such disclosure, the countervailing public interest is the exposure and due prosecution of such fraud.

Held (allowing application in terms):

(1) Section 149(1) of the LCA is the main secrecy provision prohibiting disclosure of documents and information relating to the business and affairs of a Labuan company or foreign Labuan company. However, an application for disclosure of documents and information could only be made under s. 149(6) of the LCA to a High Court of Sabah and Sarawak or to a High Court of Malaya, as the case may be. Although the plaintiff was applying for leave under s. 149(3) of the LCA for disclosure of the details and contents of the cause papers, affidavits including the grounds of decision to its foreign legal representatives and the courts of law of foreign jurisdictions, s. 149 must be read as a whole. Section 149(3) of the LCA is related to the Labuan secrecy provision in s. 149(1). Section 149(3) provides that civil proceedings relating to a Labuan company or foreign Labuan company referred to in s. 149(2) shall be heard *in camera* unless the court otherwise orders and the details of such proceedings are not to be published to other persons except with leave of court. (paras 22, 23, 28 & 29)

(2) As the uplifting of the Labuan secrecy order had been restored by the Court of Appeal, the need for such proceedings filed in the High Court of Sabah and Sarawak at Labuan or any appeals arising to be heard *in camera* may become less intense or unnecessary. Further, the defendants had not adduced any or sufficient evidence to prove the civil appeals by the plaintiff were actually heard *in camera* by the Court of Appeal. Neither was there any evidence to show that the Court of Appeal directed or ordered the said appeals to be heard *in camera* or access by non-parties to the court's file or record to be denied or restricted. Based on available evidence, the civil appeals were not heard *in camera* and there was no evidence to prove otherwise. In the absence of any order by the Court of Appeal for the appeals to be heard *in camera*, it was highly probable that the details sought to be disclosed were already disclosed or in the public domain. In the circumstances, the defendants would not be prejudiced by an order for such disclosure. (paras 30 & 31)

(3) From the cause papers filed in the foreign proceedings, there were similarities in the manner in which the alleged fraudulent refund applications were made, the identity of individuals and companies involved in the alleged fraud when compared with the plaintiff's claim in Labuan. Therefore, the details sought to be disclosed were relevant to the foreign proceedings. Leave for disclosure of the details including the contents of the cause papers, affidavits, the grounds of decision of the High Court and the grounds of the Court of Appeal, when it becomes available, to its foreign legal representatives and the courts of law of the foreign jurisdictions where there the plaintiff had commenced proceedings or actions to remedy or recover its losses caused by the alleged fraudulent applications for refund of withheld tax, should be allowed. (paras 33 & 35)

(4) The order sought by the plaintiff for discovery to the foreign jurisdictions without any limitation was too wide and could give rise to difficulty of supervision by this court and could tantamount to giving a blanket order for worldwide disclosure. Although the foreign courts had provided disclosures and/or assistance, the foreign courts did not give such blanket order when providing relevant disclosures to assist the Malaysian Court. The disclosure should only be made to the foreign legal representatives and the courts of law in the foreign jurisdictions where legal proceedings had been commenced and were pending including pending appeals by the plaintiff to remedy or recover its losses caused by the alleged fraudulent refund applications of withheld tax. There shall be liberty to apply in the event that similar legal proceedings or actions in the foreign jurisdictions or courts of law involving the alleged fraudulent applications are commenced in the future. Further, the application for disclosure of the said documents to SØIK for the limited purpose to facilitate investigations into the alleged fraud was allowed. (paras 36 & 38)

Case(s) referred to:

A-G for Gibraltor v. May [1999] 1 WLR 998 ***(refd)***

Attorney General v. Guardian Newspapers Ltd and Others (No. 2) [1988] 3 All ER 545 ***(refd)***

Attorney General of Hong Kong v. Zauyah Wan Chik & Ors and Another Appeal [1995] 2 MLJ 620 ***(refd)***

Bank of Crete SA v. Koskatos (No 2) [1993] 1 All ER 748 ***(refd)***

Barret and another v. McCormack [1999] VUCA 5 ***(refd)***

First American Corp and another v. Sheikh Zayed Al-Nahyan and others; Clifford and others v. First American Corp and others [1998] 4 All ER 439 ***(refd)***

Marlwood Commercial Inc v. Kozeny and others [2004] 3 All ER 648 ***(refd)***

Pharaon and others v. Bank of Credit and Commerce International SA (in liquidation) (Price Waterhouse (a firm) intervening); Price Waterhouse (a firm) v. Bank of Credit and Commerce International SA (in liquidation) and others [1998] 4 All ER 455 ***(refd)***

Portcullis Trustnet (Singapore) Pte Ltd & Ors v. Cardiff Ltd & Anor [2015] 6 CLJ 10 CA ***(refd)***

Skatteforvaltningen (The Danish Customs and Tax Administration) v. Solo Capital Partners LLP (in Special administration) and others [2019] EWHC 2807 ***(refd)***

The Attorney General Of Hong Kong v. Zauyah Wan Chik & Ors And Another Appeal [1995] 3 CLJ 35 CA ***(refd)***

Legislation referred to:

Banking and Financial Institutions Act 1989 (repealed), s. 97

Labuan Companies Act 1990, s. 149(1), (2), (3), (4), (6)

Labuan Financial Services and Securities Act 2010, ss. 149(3), 178(4)

Rules of Court 2012, O. 92 r. 4

For the plaintiff - Preetha Pillai, Vijay Raj, Alithea Wong & Kailash Kalaiarasu; M/s Skrine

For the 12th defendant - Aik Yin Chien; M/s Izad Kazran & Co

For the 25th, 26th, 33rd & 64 defendants - Abdullah Abdul Rahman, Derrick Moh; M/s Chooi & Company + Cheang & Ariff

For the 27th, 28th, 35th, 36th, 42nd, 59th & 65th defendants - Gregory Ling & Vellie Nethi; M/s Ranjit Singh & Yeoh

For the 29th, 30th, 34th, 39th & 66th defendants - Edwin Lim; M/s James Khong

For the 31st, 32nd, 37th, 38th, 40th, 41st, 60th & 67th defendants - Jasmin Raj; M/s K Nadarajah & Partners Advocs

For the 61st & 62nd defendants - Sylvie Tan & Izzaty Rosli; M/s Ariff Rozhan & Co

For the 63rd defendant - Edmund Yee; M/s Lee Hishammuddin Allen & Gledhill

Reported by Najib Tamby

JUDGMENT

(Encl. 316)

Leonard David Shim JC:

[1] This is an application for disclosure of, *inter alia*, details of these proceedings pursuant to s. 149(3) of the Labuan Companies Act 1990 (LCA), s. 178(4) of the Labuan Financial Services and Securities Act 2010 (LFSSA), O. 92 r. 4 ROC 2012. The orders sought by the plaintiff are as follows:

(i) The plaintiff be granted leave to furnish, disclose and publish details of these proceedings, including the contents of cause papers and affidavits filed herein, to its foreign legal representatives and the courts of law of foreign jurisdictions where the plaintiff has commenced or will commence an action to remedy or recover its losses caused by fraudulent applications for refund of (alleged) withheld dividend tax;

(ii) The plaintiff be granted leave to furnish, disclose and publish to SØIK, the State Prosecutor for Serious Economic and International Crime which is a unit within the Danish Public Prosecution Authority, the following notice of application and affidavits filed on behalf of the plaintiff in these proceedings and the following order made in these proceedings (hereinafter collectively referred to as "the said documents"):

(a) The plaintiff's notice of application for an *Anton Piller* order dated 14 June 2018 (encl. 9);

(b) The plaintiff's affidavit in support of the said notice of application affirmed by Anne Munksgaard on 19 June 2018 (encls. 17 and 18);

(c) The plaintiff's supplementary affidavit affirmed by Karthini Mahendranathan on 20 June 2018 (annexing a translation of exhs. SKAT-AP-8 and SKAT-AP-9) (encl. 22); and

(d) The *Anton Piller* order granted by this Honourable Court on 22 June 2018 (encl. 28).

(iii) The plaintiff be at liberty to apply should further orders or directions be required;

(iv) The costs of this application be costs in the cause; and

(v) This Honourable Court grant any such further, ancillary, consequential and/or other relief or direction that it deems fit and just in the circumstances.

[2] The grounds of this application are as contained in the affidavit of Anne Munksgaard (Passport No. 209021959) and are briefly as follows:

(i) The purpose of s. 149 LCA and s. 178 LFSSA is to provide a legitimate expectation of confidentiality to attract potential investors to the Labuan international jurisdiction. No such benefit should be afforded to those directly or indirectly involved in committing, organising, facilitating or permitting fraudulent conduct from or involving the jurisdiction of Labuan.

(ii) The details of the proceedings commenced before this Honourable Court, including the contents of cause papers and affidavits filed herein, are relevant to the proceedings in foreign jurisdictions.

(iii) The limited disclosure sought for SØIK through this application would facilitate investigations into the fraud committed against, in effect, the Kingdom of Denmark and therefore, the limited disclosure would be reasonable and warranted by conscionable expectations.

Backgrounds Facts

[3] The backgrounds facts which are set out in the plaintiff's submission (encl. 943) are reproduced herein to give a better understanding of the nature and extent of the dispute and the disclosure sought by the plaintiff.

[4] The plaintiff is the Customs and Tax Administration of the Kingdom of Denmark, a Danish ministerial authority. The plaintiff's claim is that it fell victim to a complex and extraordinary multinational fraud resulting in the plaintiff being defrauded of approximately DKK 12 billion through this worldwide scheme between 2012-2015.

[5] The fraudulent scheme entailed the participation of numerous actors situated in a number of jurisdictions. The US and Malaysia were used for their Double Taxation Avoidance Agreement with the Kingdom of Denmark. A tax resident in these jurisdictions who is a legitimate shareholder of Danish shares, would be entitled to apply for the refund of withheld taxes on dividends issued on these Danish shares. In this case, however, the US and Malaysian entities were used as devices through which to make fraudulent applications to the plaintiff for refunds of purported tax withheld on dividends issued by Danish corporations when these entities never owned any Danish corporation shares and never received any dividends therefrom. The persons and entities who played a part in putting together this fraudulent scheme are persons/entities in, *inter alia*, the UK and Dubai.

[6] The brief details of the plaintiff's suits filed in the other jurisdictions ("foreign proceedings") are as follows:

(i) The United Kingdom ("UK proceedings"):

On or about 4 May 2018, 15 June 2018, 11 September 2018 and 1 August 2019, legal proceedings were commenced against *inter alia* 98 persons and companies, including Sanjay Shah and a number of companies directly or indirectly controlled by Sanjay Shah, persons related to the worldwide fraudulent scheme, and payment agents.

(ii) The United States ("US proceedings"):

Actions have been filed successively from or about 4 May 2018, against 242 defendants, including:

(a) 196 pension plans that submitted fraudulent refund claims to the plaintiff;

(b) 44 individual defendants;

(c) one limited liability company defendant; and

(d) one third-party defendant.

In May 2019 or thereabouts, the plaintiff reached a confidential settlement with *inter alia* 61 pension plans and a number of related persons and companies, who have agreed to pay back approximately DKK 1.6 billion to the plaintiff.

(iii) Dubai ("Dubai proceedings"):

(a) DIFC court

An application for a freezing order and a search order against Elysium Properties and Elysium Dubai was heard on 27 June 2018 and was allowed. Both the freezing and search orders were executed on 28 June 2018. The physical search was completed on 9 July 2018 and the electronic search was completed on 22 November 2018.

(b) Dubai (on-shore)

In June 2018 or thereabouts, legal proceedings were commenced against *inter alia* 72 individuals and companies in Dubai (on-shore), including Sanjay Shah. A number of these defendants are also included in the UK complaints.

The Law

[7] Section 149 LCA provides:

(1) *No person* who has by any means *access to any record, book, register, correspondence, document, material or information relating to the business and affairs of the Labuan company or foreign Labuan company shall give, reveal, publish or otherwise disclose to any person such record, book, register, correspondence, document, material or information.*

(2) *All proceeding, other than criminal proceeding, relating to a Labuan company or foreign Labuan company shall be commenced in any Court,* either under the provisions of this Act or for determining the rights or obligations of officers, members or debenture holders.

(3) *Such proceeding and any appeal therefrom shall,* unless the Court otherwise orders, *be heard in camera and no details of the proceeding shall be published by any person without leave of the Court.*

(4) The provisions of subsection (1) shall not apply:

(a) when *lawfully required to make such disclosure by any Court or under the provisions of any law being enforced by the Authority*;

(b) for the purpose of the performance of the Authority's supervisory functions as may be provided for under any written law;

(c) when lawfully required pursuant to section 22 of the Labuan Business Activity Tax Act 1990; or

(d) when duly authorised by the Labuan company or the foreign Labuan company.

(5) A person who contravenes subsection (1) shall be guilty of an offence against this Act.

Penalty: Imprisonment for three years or one million ringgit or both.

(6) *Nothing in this section shall prevent any Court from exercising its discretion to require a person to produce any document or to give any evidence in any proceeding before the Court which is relevant to those proceedings.*

[8] Section 178 LFSSA provides:

(1) *No person* who for any reason has access to any record, book, register, correspondence or other document, material or information whatsoever *relating to the affairs or accounts of the following persons, shall disclose to any other person, or make a record for any person of any such record, book, register, correspondence or other document, material or information:*

(a) a mutual fund under Part III;

(b) any customer of a Labuan trust company or a Labuan private trust company under Part V;

(c) any customer of a bank licensee under Part VI;

(d) any policy owner under Part VII;

(e) an exchange established under Part IX;

(f) a self-regulatory organisation established under Part X; and

(g) *any licensed entity under this Act.*

(2) Subsection (1) shall not apply to:

(a) any disclosure lawfully required under section 28B of the Labuan Financial Services Authority Act 1996 or under section 22 of the Labuan Business Activity Tax Act 1990;

(b) *any disclosure required under an order of the court* made upon an *ex parte* application, provided that the person disclosing the relevant information shall notify the person affected by the order and upon receipt of such notification, the affected person may file in the necessary application to the court to contest the order or otherwise comply with the order accordingly;

(c) information relating to a mutual fund under Part III, with the prior consent of the mutual fund and its investors concerned;

(d) information relating to a customer of a Labuan trust company or a Labuan private trust company under Part V, with the prior written consent of the customer;

(e) information relating to a customer of a bank licensee under Part VI, with the prior written consent of the customer or his personal representative;

(f) information relating to a policy owner under Part VII, with the prior written consent of the policy owner or his personal representative or in the course of placement of reinsurance business;

(g) *information relating to a licensed entity, with the prior written consent of the licensed entity.*

Contention Of The Parties

[9] In their written submission (encl. 943), the plaintiff did not rely or submit on s. 178 LFSSA to support their application for disclosure. In the plaintiff's written submission in reply (encl. 961), the plaintiff submitted that as for s. 178 of the LFSSA that the Kensington defendants build their arguments upon, this provision is not applicable when the more specific s. 149 of the LCA is engaged. The former confers secrecy upon the business and affairs of a Labuan trust company, whereas this suit is concerned with the conduct of the Labuan companies that the LTCs were a conspiratorial party. Being the specific governing provision, the exception as provided in s. 149(3) of the LCA is the provision that this court should be concerned with and, as stated in the plaintiff's written submissions (encl. 943), the plaintiff now comes before this court under this provision.

[10] In essence, the plaintiff is mainly relying on s. 149(3) LCA as the statutory basis or ground to support the plaintiff's application for disclosure.

[11] The plaintiff contends that there is no question that the details of these Labuan proceedings, including the contents of the cause papers and affidavits filed in this court, are relevant to the plaintiff's proceedings that are pending or contemplated in other jurisdictions. When comparing the plaintiff's claim in Labuan to those already commenced in the foreign proceedings, there are similarities in the manner in which the fraudulent refund applications were made; and the identity of individuals and companies involved in the fraud, regardless of the jurisdiction from where the specific refund applications originated.

[12] The similarities are evident from the cause papers filed in the foreign proceedings, which are exhibited in the plaintiff's supplementary affidavit (2) (encl. 314): please see exh. SKAT-M-35 for the US proceedings; exh. SKAT-M-36 for the UK proceedings; and exh. SKAT-M-37 for the Dubai proceedings.

[13] In addition to Sanjay Shah and Solo Capital Partners LLP who are central to the global fraud, the counterparties to the agreements which the Labuan companies entered into are being sued in the UK and/or Dubai proceedings. These include:

(i) the agents who submitted the WHT refund applications on behalf of the Labuan companies, namely Syntax GIS, Goal Taxback Limited, and Acupay System LLC;

(ii) the counterparty to the Global Master Stock Lending Agreement purportedly executed by the Labuan companies, namely Colbrook Limited and its principal, one Martin Smith;

(iii) the solo stock-brokers, namely Solo Capital Partners LLP, Old Park Lane LLC, Telesto Markets LLP and West Point Derivatives Ltd. They issued the dividend credit advice notes to the Labuan companies, which were used to support their WHT refund applications; and

(iv) the shareholders of 10 of the Labuan companies, namely Mankash Jain and Paul Preston.

[14] The plaintiff contends that the orders which the plaintiff seeks through this overseas disclosure application is consonant with an established pedigree of modern cases which show that when resolving an alleged conflict between the disclosure of evidence/documents in aid of foreign proceedings litigating a multinational fraud and a duty of confidentiality preventing such disclosure, the countervailing public interest is the exposure and due prosecution of such fraud.

[15] The plaintiff set out below authorities which speak to these principles from Malaysia, the UK, as well as other offshore jurisdictions.

[16] The supporting decision of the Court of Appeal, when dealing with disclosure of documents covered specifically by s. 149 LCA 1990, in *Portcullis Trustnet (Singapore) Pte Ltd & Ors v. Cardiff Ltd & Anor* [2015] 6 CLJ 10; [2015] 4 MLJ 595, observed that:

> (a) it is trite that the laws of one country cannot restrain the jurisdiction and/or power of the court in another country and in this case Singapore. It is also well established that when courts in exercising their discretionary powers will often have due regards to the relevant laws of friendly countries if it is in issue under the comity and/or reciprocity principle;
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> (b) *reading s. 149 as a whole, it does not deal with jurisdiction and/or powers of other courts and/or interfere with the discretionary relief of courts of other countries*;
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> (c) even if it is Malaysia, the *secrecy provision stated in s. 149(1) is not absolute and is qualified by s. 149(4) and (6) of the LCA 1990. As a general rule provision for secrecy, privacy and/or confidentiality is often shun by the courts when such disclosure is needed for the good of the public* […]. No information of any kind can be absolutely restrained by agreement of the parties and/or statute from the purview of the courts under our Federal Constitution in breach of the fundamental jurisprudence relating to accountability and transparency to the court see […]. In addition statutes such as Money

Laundering Act in different countries will require disclosures and countries may have international obligation to ensure absolute secrecy provision are not placed in their legislation which may promote money laundering activities.

[17] It was submitted by the plaintiff that the last remark made in *Portcullis* is particularly poignant in the light of the facts before this Honourable Court. This court must see to it that the Labuan offshore jurisdiction and the exceptional privilege of secrecy is not abused for fraud and other financial wrongdoing.

[18] Exceptions to a duty of confidentiality in aid of foreign proceedings were also recognised by the Court of Appeal in the case of *The Attorney General of Hong Kong v. Zauyah Wan Chik & Ors and Another Appeal* [1995] 3 CLJ 35; [1995] 2 MLJ 620. The court there granted declaratory relief to the effect that the applicants in that case were permitted to give evidence or disclose information or documents which may have breached banking secrecy obligations under s. 97 of the Banking and Financial Institutions Act 1989 and that the applicants would not attract any criminal or civil liability when doing so. In reaching this decision, the Court of Appeal opined that:

To begin with, the following matters of importance must not be forgotten: (1) the prosecution, led by the Attorney General of Hong Kong wants these witnesses to give evidence before the court of the Colony; (2) the defence wish to cross-examine these witnesses before a jury in Hong Kong since questions of credibility are involved; (3) the witnesses themselves are ready and willing to give evidence before the court in Hong Kong; and (4) *our courts have, in accordance with well-established principles, decided to aid the foreign court in the gathering of evidence so as to meet the interests of justice. Accordingly, all that is done in aid of the foreign proceeding must be directed at the attainment of justice.* In the present context, *everything that is lawfully possible must be done to lend the witnesses such comfort as will enable them to testify freely before the foreign court without any apprehension operating upon their minds.* That is the object all before us seek to achieve. And I am most disinclined not to have the result all intend to have unless the law does not permit it. But I think that it does.

[19] The following United Kingdom authorities were referred to by the plaintiff in support of their application:

(i) *Attorney General v. Guardian Newspapers Ltd and Others (No. 2)* [1988] 3 All ER 545 (Chancery Division, Court of Appeal & House of Lords) (United Kingdom)

(ii) *First American Corp and another v. Sheikh Zayed Al-Nahyan and others; Clifford and others v. First American Corp and others* [1998] 4 All ER 439 (Court of Appeal) (United Kingdom)

(iii) *Pharaon and others v. Bank of Credit and Commerce International SA (in liquidation) (Price Waterhouse (a firm) intervening); Price Waterhouse (a firm) v. Bank of Credit and Commerce International SA (in liquidation) and others* [1998] 4 All ER 455 (Chancery Division) (United Kingdom)

(iv) *Marlwood Commercial Inc v. Kozeny and others* [2004] 3 All ER 648 (Court of Appeal) (United Kingdom)

(v) *Bank of Crete SA v. Koskatos (No 2)* [1993] 1 All ER 748

(vi) *A-G for Gibraltor v. May* [1999] 1 WLR 998

[20] Other offshore jurisdiction authorities referred to by the plaintiff includes:

(i) *K & S v. Z & Z BVIHCM* 2020/0016 (High Court) (British Virgin Islands)

(ii) *Arcelormittal USA LLC v. Essar Global Fund Limited & Ors*

(iii) *President of the State of Equatorial Guinea & Ors v. The Royal Bank of Scotland International & Ors*

(iv) *Barret and another v. McCormack* [1999] VUCA 5 (Court of Appeal) (Republic of Vanuatu)

[21] After perusing the written submission filed by the respective defendants, it is observed that the main grounds that were put forth to oppose this application are as follows:

(i) Section 149(3) is only applicable with regard to proceedings that must be "heard *in camera* and no details of the proceeding shall be published by any person without leave of the court". Section 149(3) LCA is not the relevant provision with regard to disclosure of cause papers and affidavits filed herein.

(ii) The plaintiff is not seeking discovery pursuant to s. 149(4) or s. 149(6) LCA.

(iii) Section 149(6) does not provide for discretion to be exercised by this court in relation to evidence to be given for the purpose of foreign proceedings. The word "court" which appear in s. 149(6) LCA refers to the High Court in Malaya and the High Court in Sabah and Sarawak. See *Portcullis* case above.

(iv) The discovery sought in encl. 316 is vague and too wide amounting to a blanket order for worldwide disclosure at any time of its choosing without any restrictions. Enclosure 316 amounts to a fishing expedition.

(v) The purpose of the disclosure to foreign jurisdictions is inherently ambiguous as the materiality and relevance of the documents and details of the proceedings sought to be disclosed have not been provided by the plaintiff.

(vi) The discovery sought in encl. 316 is not *bona fide*. The defendants are not parties in the foreign proceedings and have no control over who would have access to such documents disclosed in foreign proceedings, wherever they may take place.

(vii) Some of the proceedings in foreign jurisdictions ie, England and Dubai have been dismissed by the foreign courts and the decision ordering such dismissal is pending appeal.

Evaluation And Findings Of The Court

[22] The main secrecy provision prohibiting disclosure of documents and information relating to the business and affairs of a Labuan company or foreign Labuan Company is s. 149(1) LCA.

[23] However, an application for disclosure of documents and information could only be made under s. 149(6) LCA to a High Court of Sabah and Sarawak or to a High Court of Malaya, as the case may be. See *Portcullis Trustnet (Singapore) Pte Ltd & Ors v. Cardiff Ltd & Anor* [2015] 6 CLJ 10 (CA).

[24] It is not disputed that the civil proceedings herein involve Labuan companies or entities at the material time and are subject to the secrecy provision under s. 149 LCA (Labuan secrecy).

[25] By an *ex parte* order dated 22 June 2018 (encl. 29) made pursuant to s. 149(6) LCA, s. 178 LFSSA and O. 92 r. 4 ROC 2012, the High Court of Sabah and Sarawak at Labuan uplifted the Labuan secrecy (the Labuan secrecy order) and ordered, *inter alia*, that:

> *any person who has by any means any access to any record, book, register, correspondence, document, material or information relating to the business of the Labuan Companies* listed as Defendants 1 to 24 ("the Labuan Companies") and the *Labuan Trust Companies* listed as Defendants 64 to 67 ("the Labuan Trust Companies") *shall give, reveal, publish* and/or *disclose to* the *Plaintiff, its servants, agents* and *representatives* and/or *legal advisers (both internal and external),* such *record, register, correspondence, document, material* or *information relating to the Labuan Companies and Labuan Trust Companies relating to these proceedings* AND IT IS ALSO ORDERED that the Plaintiff be at liberty to apply AND IT IS LASTLY ORDERED that costs be costs in the cause.

[26] Upon the applications by the defendants (encl. 142, 148, 183 and 191), the Labuan secrecy order was set aside by the High Court, Labuan on 27 May 2019 (the High Court's decision). The *Mareva* order (MI), *Anton Piller* order (AP) and consequential order regarding the seized items in relation to the *ex parte* AP order were also set aside on the same date.

[27] On 10 June 2019, the plaintiff appealed to the Court of Appeal against the High Court's decision setting aside the MI, AP, consequential orders and the Labuan secrecy order (encl. 598). Sixteen appeals relating to the High Court's decision dated 27 May 2019 were filed on 10 June 2019. The Court of Appeal allowed the plaintiff's appeal against the High Court's decision on 24 November 2020 in Civil Appeals No 1134-1137 and restored the order uplifting the Labuan secrecy. The MI, AP and consequential orders were also restored by the Court of Appeal in the other related civil appeals on 24 November 2020 which is binding on this court.

[28] Although the plaintiff is applying for leave under s. 149(3) LCA for disclosure of the details and contents of the cause papers, affidavits including the grounds of decision to its foreign legal representatives and the courts of law of foreign jurisdictions, s. 149 must be read as a whole. In *Portcullis Trustnet (Singapore) Pte Ltd & Ors v. Cardiff Ltd & Anor* (above), the Court of Appeal stated that:

> (ii) **reading s. 149 as a whole**, it does not deal with jurisdiction and/or powers of other courts and/or interfere with the discretionary relief of courts of other countries;

[29] Section 149(3) LCA is related to the Labuan secrecy provision in s. 149(1). Section 149(3) provides that civil proceedings relating to a Labuan company or foreign Labuan company referred to in s. 149(2) shall be heard *in camera* unless the court otherwise orders and the details of such proceedings are not to be published to other persons except with leave of the court.

[30] As the uplifting of Labuan secrecy order has been restored by the Court of Appeal, the need for such proceedings filed in the High Court of Sabah and Sarawak at Labuan or any appeals arising therefrom to be heard *in camera* may become less intense or unnecessary. As stated by the Court of Appeal in *Portcullis*' case, the secrecy prohibition in s. 149(1) LCA is not absolute and is qualified by s. 149(4) and (6) of the LCA.

[31] Further, the defendants have not adduced any or sufficient evidence to prove the aforesaid civil appeals by the plaintiff were actually heard *in camera* by the Court of Appeal. Neither is there any evidence to show that the Court of Appeal had directed or ordered the said appeals to be heard *in camera* or access by non-parties to the court's file or record to be denied or restricted. Based on the available affidavit evidence, it appears that the civil appeals were not heard *in camera* and there is no evidence to prove otherwise. In the absence of any order by the Court of Appeal for the appeals to be heard *in camera*, it is highly probable that the details sought to be disclosed are already disclosed or in the public domain. In the circumstances, the defendants would not be prejudiced by an order for such disclosure. In *Skatteforvaltningen* (*The Danish Customs and Tax Administration) v. Solo Capital*

Partners LLP (in Special administration) and others [2019] EWHC 2807 referred to by the parties, the High Court of UK and Wales (per Justice Bryan) stated that:

> 28. Firstly, I take account of the fact that the **statements of case are already publicly available under CPR 5.4(1). None of the Defendants,** as I have already noted, have **sought to have the court to file sealed or otherwise have access to it restricted.** The pleadings have been accesses by the media and have been the subject of Press reports. **They are a matter of public record, in furtherance of the constitutional principle of open** justice that I have identified. I consider that the position is **analogous to that where the documents have been read to open court** …
>
> 36. In reaching this conclusion, I have also considered whether there could be any injustice to any of the respondents to the Order sought in circumstances where the **statements of case are already in the public domain. I am satisfied that there is no risk of injustice to any of those respondents,** not least in circumstances where the statements of case are already a matter of public record.

[32] Hence, reading s. 149 LCA as a whole, this court finds that the prohibition against the disclosure of the details of the proceedings under s. 149(3) LCA would not be applicable in so far as the said civil appeals are concerned. As regards the documents and proceedings in the Labuan High Court, the order uplifting the Labuan secrecy under s. 149(1) has been restored by the Court of Appeal to permit disclosure as set out in the uplifting of Labuan secrecy order.

[33] From the cause papers filed in the foreign proceedings, there are similarities in the manner in which the alleged fraudulent refund applications were made, the identity of individuals and companies involved in the alleged fraud when compared with the plaintiff's claim in Labuan. The relevancy of the details and the grounds of decision to the appeal in the English Court of Appeal can be seen in paras. 7-9 of the plaintiff's supplementary affidavit (3) (encl. 1002). Therefore, this court is satisfied that the details sought to be disclosed are relevant to the foreign proceedings.

[34] The Court of Appeal in Civil Appeals No. 1134-1137 had taken into consideration the salient fact that the plaintiff has established a good arguable case in respect of the *Mareva* order and a strong *prima facie* case in respect of the *Anton Piller* order, when allowing the plaintiff's appeal to restore the uplifting of Labuan secrecy order. Hence, the Labuan secrecy has been uplifted by the court pursuant to s. 149(6) LCA. Further, it was stated by the Court of Appeal in *Portcullis*'s case that "s. 149(1) does not prohibit disclosure to courts in Malaysia and/or other countries any information through witnesses and/or affidavits".

[35] In the premises, this court is inclined to agree with the plaintiff's submissions that leave for disclosure of the details including the contents of the cause papers, affidavits, the grounds of decision of the High Court and the grounds of the Court of Appeal (when it becomes available) to its foreign legal representatives and the courts of law of the foreign jurisdictions where there the plaintiff has commenced proceedings or actions to remedy or recover its losses caused by the alleged fraudulent applications for refund of withheld tax should be allowed.

[36] However, this court also agrees with the defendants' contention that the order sought by the plaintiff for discovery to the foreign jurisdictions without any limitation is too wide and could give rise to difficulty of supervision by this court and could tantamount to giving a blanket order for worldwide disclosure. Although the foreign courts had provided disclosures and/or assistance, the foreign courts did not give such blanket order when providing relevant disclosures to assist the Malaysian court.

[37] Having regard to the above observation and findings, the disclosure herein shall only be made to the foreign legal representatives and the courts of law in the foreign jurisdictions where legal proceedings have been commenced and are pending including pending appeals by the plaintiff to remedy or recover its losses caused by the alleged fraudulent refund applications of withheld tax. There shall be liberty to apply in the event that similar legal proceedings or actions in the foreign jurisdictions or courts of law involving the alleged fraudulent applications are commenced in the future.

[38] Further, the application for disclosure of the said documents to SØIK for the limited purpose to facilitate investigations into the alleged fraud as stated in encl. 316 and 317 is allowed.

Conclusion

[39] Subject to the above limitation on the extent of the disclosure and based on the foregoing reasons, the plaintiff's application herein is allowed in terms of prayers 1, 2 and 3 of encl. 316.

[40] As the parties have not fully succeeded in their respective contentions in respect of encl. 316, this court makes no order as to costs.